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No. 96-1280

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

A. Petitioners Challenge a Facial Classification That Disadvantages Women; Therefore The Disparate Impact Authority Relied on by Respondents is Wholly Inapposite. 1

B. This Case Presents the Circuit Split Identified in the Petition 4

C. Respondents' Asserted "Neutral Reasons" for Treating Incarcerated Women and Men Differently Were Never Presented to the Courts Below And Are Immaterial to the D.C. Circuit's Analysis 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Canterino v. *Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), *rev'd in part on other grounds*, 869 F.2d 948 (6th Cir. 1989) 6

Canterino v. *Wilson*, 875 F.2d 862 (6th Cir.) *cert. denied*, 493 U.S. 991 (1989) 5

Craig v. *Boren*, 429 U.S. 190 (1976) 2, 8

International Union, UAW v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) 3

J.E.B. v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994) 7

Jeldness v. *Pearce*, 30 F.3d 1220 (9th Cir. 1994) 4, 5

Keevan v. *Smith*, 100 F.3d 644 (8th Cir. 1996) 4

Klinger v. *Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995) 2, 4

Klinger v. *Department of Corrections*, Nos. 96-1241, 96-1243, 1997 U.S. App. LEXIS 3296 (9th Cir. Feb. 25, 1997) 5

Madyun v. *Franzen*, 704 F.2d 954
(7th Cir.), *cert. denied*,
464 U.S. 996 (1983) 5

Mississippi Univ. for Women v. *Hogan*,
458 U.S. 718 (1982) 2, 7, 8

Pargo v. *Elliott*, 69 F.3d 280
(8th Cir. 1994), *cert. denied*,
115 S. Ct. 1177 (1994) 4

Personnel Administrator of Massachusetts
v. *Feeney*, 442 U.S. 256 (1979) 3

Pitts v. *Thornburgh*, 866 F.2d 1450
(D.C. Cir. 1989) 2

Smith v. *Bingham*, 914 F.2d 740
(5th Cir. 1990), *cert. denied*,
499 U.S. 910 (1991) 5

United States v. *Virginia*,
116 S. Ct. 2264 (1996) 2, 4, 7

STATUTES AND REGULATIONS

34 C.F.R. § 106.31(a) 6

34 C.F.R. § 106.31(d) 6

34 C.F.R. § 106.38(b) 6

34 C.F.R. § 106.41 . . . . . 4, 6

34 C.F.R., Pt. 100, App. B, VII, A, B 6

REPLY TO BRIEF IN OPPOSITION

Respondents District of Columbia *et al.* in their brief in opposition do not even attempt to defend the decision below, in which the Court of Appeals for the D.C. Circuit held that it would not apply any level of scrutiny—under either the constitutional equal protection guarantee or the statutory prohibitions of Title IX—to the differential treatment of incarcerated men and women. Instead, respondents offer several "alternative" grounds for affirming the decision below, other than the one actually adopted by the D.C. Circuit. These "alternative" grounds advanced by respondents are meritless and, in any event, are irrelevant to the question presented in the petition for certiorari, which asks this Court to review what the Court of Appeals *did* do, not what it might have done differently.

A. Petitioners Challenge a Facial Classification That Disadvantages Women; Therefore The Disparate Impact Authority Relied on by Respondents is Wholly Inapposite.

The District of Columbia argues that certiorari should not be granted because this is a "disparate impact" case that does not implicate the possibility of invidious discrimination. Opp. at 6-10, 16-17. That position forms no part of the Court of Appeals' analysis and is inconsistent with decades of equal protection jurisprudence from this Court.

The District of Columbia incarcerates all minimum-security male offenders at the Lorton Minimum Security Facility, and all minimum-security female offenders at the lesser-equipped "Annex" to that facility. It incarcerates medium-security men according to their diagnostic and program needs at the Lorton Medium, Central, or Occoquan Facilities, and all medium-security female offenders,

regardless of their needs, at the Correctional Treatment Facility (CTF).

The decision to house women in certain facilities with inferior programs and services and men in different facilities with superior programs and services facially classifies on the basis of sex. *See Klinger v. Department of Corrections*, 31 F.3d 727, 734 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995); *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989). Under this Court's precedents, such sex-based facial classifications call for heightened scrutiny under the Fifth and Fourteenth Amendments. *See United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (*VMI*); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 198 (1976). The Court of Appeals did not dispute that the District had engaged in facial classification on the basis of sex—nor could it consistent with its prior decision in *Pitts*, 866 F.2d at 1453—but declined to apply heightened scrutiny to differential treatment in prison programming on the ground that the two groups simply could not be compared. App. 30a-34a.

Respondents argue that the differential treatment of incarcerated men and women should not be analyzed as a facial classification warranting heightened scrutiny, but rather as an "official action that, although facially gender neutral, results in a disproportionate impact on one sex." Opp. at 7. This argument might have merit if the District's policy for making programs available to prisoners was based on length of sentence or type of offense or any other gender-neutral criteria. That is not the case, however. Gender actually determines the facility in which an offender will be incarcerated and the programs to which he or she will have

access.[1] The District's reliance on *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and the other "disparate impact" cases it cites, Opp. at 7, is therefore misplaced.

The fact that "segregation on the basis of sex is the rule in our nation's state and federal prisons," Opp. at 16, does not change the fact that this is a facial classification. Neither do the motives underlying the District's decision to provide women prisoners with substantially different and inferior programs. As this Court explained in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991):

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicitly facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. . . . [T]he motives underlying the employer's express exclusion of women does not alter the intentionally discriminatory character of the policy.

Id. at 199. Yet the "malevolent motive" standard is precisely that which is urged by respondents. Opp. at 7-9, 16-17.

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[1] The District's assertion that medium-security women were placed in CTF not "because they were women" but because "that is where the District had a block of medium security spaces," Opp. at 7, is incorrect. Despite the block of available spaces at CTF when it opened, general population men continued to be assigned to Medium, Central, or Occoquan, and *only* general population women (precisely because they were women) were assigned to CTF, which is not a medium-security facility but rather a controlled-movement, high-security prison.

Nor does the fact that petitioners have not challenged the sex segregation itself mean that they have forfeited the right to comparable treatment. As Judge Rogers stated in her dissent from the decision below: "Even if the District may properly segregate prisoners by sex, it does not follow that it may segregate them by sex *into unequal facilities*." App. 60a. Contrary to respondents' assertion, Opp. at 16 n.6, the decision in *VMI* does not suggest otherwise. The Court in *VMI* assumed that the education programs could remain segregated *if* they provided equal opportunity. *See* 116 S. Ct. at 2276 n.7, 2286. Similarly, the Title IX athletics regulations and cases recognize that while sex-segregation may be permissible, the segregated group of women may not be denied equal opportunity. *See* 34 C.F.R. § 106.41; *see also Jeldness v. Pearce*, 30 F.3d 1220, 1228-29 (9th Cir. 1994). Thus, the "lawful" segregation of prisoners does not eliminate the need for heightened scrutiny of the District's unequal treatment of the segregated group.

B. This Case Presents the Circuit Split Identified in the Petition.

The petition for certiorari referred the Court to a number of cases in which circuit courts have addressed the issue of whether the treatment of incarcerated men and women is comparable. Pet. at 12-18. In arguing that "any circuit conflict on the issue in this case does not warrant review," Opp. at 11, respondents have ignored many of those cases and have unsuccessfully distinguished the others.

As is apparent in the petition for certiorari, the issue of how the treatment of incarcerated men and women should be compared has arisen primarily in cases involving constitutional equal protection challenges. *See, e.g., Klinger*, 31 F.3d at 733; *Pargo v. Elliott*, 69 F.3d 280 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1994); *Keevan v. Smith*, 100 F.3d

644, 648-49 (8th Cir. 1996); *Canterino v. Wilson*, 875 F.2d 862 (6th Cir.) *cert. denied*, 493 U.S. 991 (1989); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983); *Smith v. Bingham*, 914 F.2d 740 (5th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991).

It also has arisen in the context of Title IX. *See, e.g., Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). Since the petition was filed, another Title IX prison case has been decided. *See Klinger v. Department of Corrections*, Nos. 96-1241, 96-1243, 1997 U.S. App. LEXIS 3296 (9th Cir. Feb. 25, 1997) (*Klinger II*). That case expressly rejects the approach taken by the D.C. Circuit in the decision below, exacerbating the split in the circuits. *Id.* at *11-*13 & n.6.

In the decision under review, the D.C. Circuit held that for purposes of *both* the constitutional equal protection guarantee and Title IX, men and women prisoners were not "similarly situated" and therefore the differential treatment of the two groups could not be compared. App. 29a, 35a-36a. Thus both aspects of the circuit split are implicated in the decision below.

Respondents ignore the constitutional split and assert that the split on the application of Title IX does not warrant review because the particular programs affected by the decision of the D.C. Circuit (prison work details, prison industries, recreation, and religious programs) are different from the programs at issue in the conflicting cases, which involved more traditional educational and vocational programs. Opp. at 12. The Court of Appeals questioned whether these less traditional programs were covered by Title IX, App. 36a, but did not reach the issue because of its threshold determination that incarcerated men and women are not similarly situated. App. 30a-34a.

On the basis of the issue that the D.C. Circuit did not decide (the extent of Title IX), respondents ask this Court to disregard the split in the circuits created by what it actually *did* decide (that the programs available to men and women simply could not be compared). But the D.C. Circuit's reasoning as to why Title IX did not provide a basis for comparing the work and recreational programs for men and women prisoners would apply equally to the types of education and vocational training that respondents do not dispute would be covered by the statute. Opp. at 12-13.[2]

The split identified in the certiorari petition, which has deepened with the recent decision of the Eighth Circuit in *Klinger II*, is squarely presented and ripe for review.

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[2] Moreover, the district court's interpretation of Title IX and its implementing regulations as applicable to prison work training, industry and work details is clearly correct. *See* 34 C.F.R., Pt. 100, App. B, VII, A, B (requiring recipients to ensure nondiscrimination in "work study," "job placement programs" and "apprentice training"); 34 C.F.R. § 106.31(a) (prohibiting sex discrimination in "occupational training" offered by a recipient); 34 C.F.R. § 106.31(d) (treating "cooperative employment" as an education program or activity); 34 C.F.R. § 106.38(b) ("A recipient which employs any of its students shall not do so in a manner which violates" Title IX); *see also Canterino v. Wilson*, 546 F. Supp. 174, 191-92 (W.D. Ky. 1982) (Title IX applies to vocational training, industries, on-the-job-training), *rev'd in part on other grounds*, 869 F.2d 948 (6th Cir. 1989).

The court also correctly held that the Title IX regulations extend to recreational programs and activities. In addition to prohibiting discrimination on the basis of sex in extracurricular activities generally, *see, e.g.*, 34 C.F.R. § 106.31, the Title IX regulations also regard intramural athletics as an "education program or activity" governed by Title IX. *See* 34 C.F.R. § 106.41.

C. Respondents' Asserted "Neutral Reasons" for Treating Incarcerated Women and Men Differently Were Never Presented to the Courts Below And Are Immaterial to the D.C. Circuit's Analysis.

The District argues that the equal protection analysis which petitioners have claimed is warranted by virtue of the facial classification of male and female prisoners "is based on the false premise that treating lawfully segregated groups differently for neutral reasons constitutes sex discrimination." Opp. at 16. Respondents then suggest several reasons behind the differential treatment of men and women, including the older nature of the men's facilities and the history of violence in the Lorton facilities. Opp. at 20. As evidenced by the lack of citation, these statements are wholly unsupported by the record below and, in any event, are immaterial to the analysis of the D.C. Circuit, which determined at the threshold that men and women prisoners cannot be compared without ever asking whether the differential treatment could be justified on non-discriminatory grounds. App. 68a ("The court's failure to consider the purposes of the various prison programs at issue is perhaps understandable, inasmuch as the District has not supplied any.") (Rogers, J., dissenting).

In any event, the supposedly "neutral" reasons for differential treatment now suggested by respondents would not stand up to even minimal scrutiny, much less the heightened scrutiny demanded by this Court's precedents. *See VMI*, 116 S. Ct. at 2274; *J.E.B. v. Alabama*, 511 U.S. 127, 136-37 & n. 6 (1994); *Mississippi Univ. for Women*, 458 U.S. at 724. For example, respondents suggest that men work in skilled work details because they live in older facilities requiring more maintenance. Opp at 20. Yet the Annex buildings are equally old and in need of maintenance—and that maintenance is provided by men, even though the women inmates have

requested to work on the building themselves. App. 108a-109a.

Similarly, respondents' suggestion that men are provided with programs because they are more violent as a group than are women, Opp. at 20, does not explain how that group-based characteristic is related to providing men with superior college education, employment opportunities, and work training in the community. It is simply not the case that the more violent male inmates qualify for programming. To the contrary, an inmate can only participate in programs such as industry or community employment if he is non-violent and demonstrates good behavior.

The purpose of applying heightened scrutiny to facial classifications based on gender is to ensure that the government is not "employing gender as an inaccurate proxy for other, more germane bases of classification." *See Craig v. Boren*, 429 U.S. at 198; *Mississippi Univ. for Women*, 458 U.S. at 726; *see also J.E.B. v. Alabama*, 511 U.S. at 135 (the Court has "consistently subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender.").

Under the analysis adopted in the decision below, a court cannot determine whether the District is treating incarcerated women differently because of an exceedingly persuasive reason substantially related to the differential treatment, or because of an unlawful reason, or for no reason at all. The District in its brief in opposition makes no attempt to justify that holding but instead belatedly offers up what it asserts to be nondiscriminatory reasons supporting its differential treatment. Even a cursory analysis reveals that these "reasons" are far from "neutral." In justifying the absence of

heightened scrutiny, respondents have instead demonstrated the need for it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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